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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

TEXACO, INC., AND THE B. F. GOODRICH COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in the above case on September 25, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 383 F. 2d 942. The opinion (App. B, *infra*) and final order (App. C, *infra*) of the Federal Trade Commission are not officially reported. The prior opinions of the court of appeals and of this Court are reported at 336 F. 2d 754 and 381 U.S. 739. The prior opinions of the Federal Trade Commission are reported at 58 F.T.C. 1176 and 62 F.T.C. 1172 and

are reproduced at JA 175 and JA 302.[1] The initial decision of the Hearing Examiner and his initial decision after remand from the Commission are reproduced at JA 153 and JA 200, respectively.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*) was entered on September 25, 1967. On December 14, 1967, Mr. Chief Justice Warren extended the time for filing a petition for writ of certiorari to and including January 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the standards set forth in *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, the Federal Trade Commission was warranted in concluding that it is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act for a major oil company, which has dominant economic power over its dealers, and a major rubber company, to enter into an agreement whereby the oil company promotes and takes steps to induce its dealers to purchase the rubber company's tires, batteries and automotive accessories, in return for a commission on all such sales.

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[1] JA refers to the printed Joint Appendix, JAX refers to the exhibit volumes of the Joint Appendix, and SJA refers to the Supplemental Joint Appendix, filed in the court of appeals.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides, in pertinent part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. * * * The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

This is one of three contemporaneous but separate proceedings in which the Federal Trade Commission held that a sales commission arrangement between a major oil company and a leading producer of tires, batteries and automotive accessories ("TBA") for the distribution of TBA through the retail gasoline service stations of the oil company was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. In *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, this Court sustained the Commission's order against the Goodyear Tire and Rubber Company and the Atlantic Refining Company. In *Shell Oil Company* v. *Federal Trade Commission*, 360 F. 2d 470, certiorari denied, 385 U.S. 1002, the Court of Appeals for the Fifth Circuit, subsequent to this Court's decision in *Atlantic*, sustained the Commission's order against the Shell Oil Company and The Firestone Tire & Rubber Company. In both of these cases the oil and tire companies were enjoined from participating in any such

sales commission arrangements with any other company.

The present case involves the validity of sales commission agreements that the respondent Texaco, Inc. ("Texaco") has entered into with respondent B. F. Goodrich Co. ("Goodrich") and with the Firestone Tire and Rubber Company ("Firestone"),[3] two major rubber companies, under which Texaco undertook to promote the sale of Goodrich and Firestone TBA to its dealers, and the latter companies agreed to pay Texaco a commission upon their sales of TBA to such dealers. The Commission held that these arrangements for the distribution of TBA were unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, and entered a cease-and-desist order. The Court of Appeals for the District of Columbia Circuit set aside the Commission's order and instructed the agency to dismiss the complaint.

A. THE TEXACO-GOODRICH ARRANGEMENT

Texaco, whose 1954 sales were more than one and one-half billion dollars (JA 181), is one of the Nation's largest petroleum companies. It sells its petroleum products to approximately 30,000 service stations (JA 221, SJA 182). Some of these dealers lease their stations directly from Texaco, usually initially for one year, renewable thereafter on a year-

[3] Firestone has since become subject to a final order of the Commission prohibiting its use of a sales commission plan with any oil company. See *Shell Oil Company* v. *Federal Trade Commission*, 360 F. 2d 470, 474 (C.A. 5), certiorari denied, 385 U.S. 1002.

to-year basis, and terminable upon ten days notice by either party. Each lease contains general housekeeping requirements concerning the station's use, maintenance and general appearance which, if breached, can result in immediate cancellation by Texaco without notice to the lessee (JA 206–207, 226, SJA 182–183). Other dealers ("contract dealers") either own their own stations or lease them from third parties. These dealers lease pumps and other facilities from Texaco. Both categories of dealers enter into a gasoline "Agreement of Sale," prescribing annual minimum and maximum purchases at current Texaco prices. This agreement generally also runs from year-to-year and is terminable upon thirty days notice; it is automatically cancelled if the lease of a dealer is terminated (JA 204, SJA 182).

Goodrich, one of the four largest rubber companies in the United States, manufactures a full line of tires, tubes, and related products. In addition, it purchases for resale batteries labeled BFG, and a full line of automotive accessories which are sold under the manufacturers' nationally advertised brand names (JA 179–180, 217). In 1954, it distributed these products through almost 500 company-owned stores and through many independent dealers throughout the United States. Its net sales in that year exceeded one-half billion dollars (JA 180–182, 217–218).

The Texaco-Goodrich agreement provides that Goodrich will pay Texaco a commission on all purchases of Goodrich TBA by Texaco consignees, dealers or distributors in "consideration of the aid to be given and the services to be rendered by [Texaco's]

sales organization in connection with promoting the sale of Goodrich products" (JAX 8). In performing this agreement Texaco has carried out the following promotional activities, among others: (a) when interviewing prospective dealers, Texaco emphasized the importance of TBA and recommended sponsored products (J.A. 216, S.J.A. 183); (b) all of Texaco's sales campaign materials and literature discussing the importance of TBA utilized and recommended sponsored products (J.A. 208, 345–346, 361–362, S.J.A. 184); (c) sponsored companies were notified of new dealers and stations before they began operation, thus enabling the sponsored companies to sign them up before competitors were even aware of their existence (J.A. 399–400, 511, 723, S.J.A. 183–184); (d) Texaco salesmen continually promoted sponsored TBA in their day-to-day contacts with the dealers (J.A. 330, 412, 526–527, S.J.A. 184); (e) Texaco and tire company salesmen called on dealers together (J.A. 539, 680, S.J.A. 184); and (f) Texaco used sales figures on sponsored TBA in evaluating the economic performance of its service stations (J.A. 316–317, 505, 719–720, S.J.A. 185).

In 1955, Texaco's 30,000 service stations constituted approximately 16.5 percent of the country's total of more than 180,000 stations. The dollar volume of sponsored TBA sold to Texaco dealers by Goodrich and Firestone in the period 1952–1956 was $245 million; in 1956 alone it was almost $60 million (JA 209, SJA 182). Texaco received a commission of 10 percent on sales of sponsored TBA to Texaco retail dealers and of 7½ percent on sales to its wholesale distributors

(JA 207). The total TBA commissions received by Texaco in the period 1952–1956 were almost $22 million (JA 210).

B. PRIOR JUDICIAL REVIEW OF THE COMMISSION'S ORDER

The Commission's first order to cease and desist was issued on April 15, 1963 (62 F.T.C. 1197).[3] Upon judicial review, the Court of Appeals for the District of Columbia Circuit set aside that order (336 F. 2d 754). The court held (1) that Chairman Dixon was disqualified from participating in the proceeding because of statements he had made about the case to a petroleum retailers' meeting, and (2) that the sales commission plan was not illegal because there was no proof that Texaco had sufficient economic power over its dealers to force them to buy sponsored TBA products or had engaged in overt coercive practices. The Commission filed a petition for a writ of certiorari to

[3] Previously, on March 9, 1961, the Commission had remanded the case to the hearing examiner for the taking of additional evidence on the competitive effects of the sales commission plan (58 F.T.C. 1176). After unsuccessful efforts in the district court, the court of appeals and this Court by Texaco and Goodrich to enjoin further proceedings, the hearing examiner held a hearing and issued a revised opinion. On appeal, the Commission concluded that the additional evidence which had been adduced on remand and which the respondents had challenged as incompetent or immaterial was unnecessary for its decision and held the sales commission plans illegal on the same basis as in the *Atlantic* and *Shell* cases (62 F.T.C. 1172). After the court of appeals set aside the Commission's order (336 F. 2d 754), this Court remanded the case to the Commission for further consideration in light of *Atlantic* (381 U.S. [illegible]). Thus, the question of the examiner's compliance with the Commission's remand order and the admissibility of the evidence adduced on remand is no longer relevant, for the Commission has not relied on it. 73

review the second part of the decision, but did not challenge the ruling on Chairman Dixon's disqualification. Petition for a writ of certiorari, No. 635, October Term, 1964.

While the *Texaco* petition was pending, this Court granted certiorari in the companion *Atlantic Refining* case, and there upheld the Commission's order directed against the Atlantic-Goodyear sales commission plan. One week after its decision there, the Court granted the *Texaco* petition, vacated the judgment of the court of appeals and remanded the case to the Commission for further consideration in light of *Atlantic. Federal Trade Commission* v. *Texaco, Inc.*, 381 U.S. 739.

C. PROCEEDINGS FOLLOWING REMAND

Pursuant to this Court's remand order, the Commission reconsidered the record in this case and issued a new opinion holding the sales commission plan to be an unfair method of competition.

The essence of the *Atlantic* decision, according to the Commission, was that "while coercive practices aggravate the restraint imposed by the sales commission plan, it is the oil company's power over its dealers, derived from the contractual relationship between them, and the utilization of that power through the performance of the promotional services required by the sales commission agreement, which renders the sales commission plan unlawful" (App. B, *infra*, p. 50). In reviewing the record, the Commission ruled that the economic dependence of Texaco dealers is the same as that of Atlantic dealers (App. B, *infra*, p. 58), and that the oil company need not engage in overtly

coercive tactics in order effectively to exercise its dominant economic power over its dealers. The Commission stated that the various promotional activities engaged in by Texaco inevitably "impress upon Texaco dealers, through constant repetition and in a variety of ways, that Texaco, whose favor the dealer must court, has a strong interest in their purchase of the sponsored TBA products (App. B, *infra*, pp. 58-59).

On the issue of anticompetitive effect, the Commission held that no extensive economic analysis was required, since the amount of commerce involved was substantially greater than that in the *Atlantic* case. It pointed to evidence that competing sellers of TBA had been foreclosed from the Texaco service station mark[illegible] *i.e.*, testimony by former Texaco dealers and competing TBA suppliers that the Texaco dealers did not feel that they were free to buy from non-sponsored suppliers (App. B, *infra*, pp. 57-58, 60).

The Commission's order enjoined both Texaco and Goodrich from entering into a TBA sales commission contract with any other company. In this respect, the order was identical in scope to that approved by this Court in *Atlantic*.

The Court of Appeals for the District of Columbia Circuit again set aside the order, and instructed the agency to dismiss the complaint. The court read this Court's *Atlantic* decision as establishing "three essential components" for a sales commission agreement to be illegal:

> "(a) the oil company's dominant economic power over its dealers;
>
> (b) exercise of that power over its dealers;

(c) anticompetitive effects of using that power." (App. A, *infra*, p. 27).

The court conceded that the Commission satisfactorily established the first of these elements in the instant case. As to the second, the court held: "We can glean nothing from the utterances of the Supreme Court which alters the basic rule that a finding of coercion is the threshold requirement of a determination of exercise of dominent economic power" (App. A, *infra*, p. 30). Since the court did not consider the promotional activities described by the Commission as coercive, it concluded: "We do not find that Texaco used its controlling economic power to compel its dealers to purchase sponsored TBA" (App. A, *infra*, p. 34). As to the third element, the court held that "there is an absence of substantial evidence which supports a finding of anticompetitive effects" (App. A, *infra*, p. 39). The court relied in substantial part upon its view that the hearing examiner had found that Texaco dealers were free to choose whatever TBA they wanted—a finding it concluded was supported by the weight of the testimony.

REASONS FOR GRANTING THE WRIT

In reversing the Commission's holding that the Texaco-Goodrich sales commission plan constitutes an unfair method of competition, the court of appeals departed from the principles enunciated by this Court in *Atlantic Refining* for reviewing Commission determinations that particular practices violate Section 5; has raised serious doubt as to the general legality of such plans when utilized by major oil and major tire

companies; and creates discriminatory treatment of major competitors in the oil and tire industries, since two major firms in each industry have been enjoined from entering into such agreements while Texaco and Goodrich now are free to continue their substantially identical plan and, indeed, to enter into new ones. By thus permitting Texaco, without making any investment in distributional facilities or TBA inventory, to receive substantial commissions for the sale of TBA to its service stations while, for example, its smaller competitor, Atlantic Refining Company, is barred from the same economic opportunity, the decision results in what the Commission said would be "a harmful competitive imbalance among the leading firms" in both the oil and tire industries (App. B, *infra*, p. 56). At the same time, the decision suggests a blueprint by which all except those enjoined in the *Atlantic* and *Shell* cases can achieve the same anti-competitive economic consequences that concerned the Commission and the reviewing courts in those cases, and thus it constricts the economic effectiveness of this Court's holding in *Atlantic*. Review by this Court is plainly warranted.

In *Atlantic Refining* this Court held that, in reviewing a Commission determination that a particular business practice constitutes an unfair method of competition, judicial review "is limited to determining whether the Commission's decision 'has "warrant in the record" and a reasonable basis in law,'" and that the courts "necessarily '* * * give weight to the Commission's conclusions'" (381 U.S. at 367-368). The Court there held that the Commission's conclusion

that the Atlantic-Goodyear sales commission plan was an unfair method of competition satisfied both of those criteria. In the present case the court of appeals, applying these standards to test the Commission's finding that the similar Texaco-Goodrich plan had the same basic anticompetitive effect, reviewed the agency's decision by comparing the extent to which the parties in the present case had utilized the methods employed in the *Atlantic* case for bringing to bear the oil company's economic power upon its dealers. Fairly read, however, *Atlantic* does not even suggest that the validity of other sales commission plans is to be determined on such a basis; the particular techniques used by Atlantic Refining and Goodyear were not essential elements of the finding of illegality, but rather methods by which those companies exercised their power in that particular case. If a sales commission plan has the basic vice involved in *Atlantic*—"the utilization of economic power in one market to curtail competition in another" (381 U.S. at 369)—the Commission properly may find it to be an unfair method of competition, even though different methods may be used, and to different degrees, in exercising such power. Tested by the proper standards, the Commission was fully warranted in concluding that the Texaco-Goodrich plan—no less than the Atlantic and Shell plans—violates Section 5 of the Federal Trade Commission Act.

In *Atlantic* this Court upheld the Commission's conclusion that the illegality in TBA sales commission arrangements results from the existence and exercise of the oil company's dominant economic power

over its dealers. While both the Commission and the court of appeals in *Atlantic* had found that the oil company had engaged in coercive practices, nothing in this Court's opinion indicated that the use of coercion was the factor which made the agreement illegal. On the contrary, the Court expressly noted that the Commission's view was that coercive practices were merely "symptomatic of a more fundamental restraint of trade" (381 U.S. at 361) and that illegal "effects on competition flowed from the contract itself." (381 U.S. at 370.) The fundamental evil of the sales commission plan involved in *Atlantic* was the "utilization of economic power in one market to curtail competition in another" (381 U.S. at 369). Moreover, this Court recognized "the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies and suppliers" (381 U.S. at 371).

Consistently with *Atlantic*, the Commission in the instant case concluded that the various promotional activities undertaken by Texaco "constitute a forceful exercise of its economic power over its dealers" (App. B, *infra*, p. 58). The court of appeals, however, set this finding aside, stating: "We can glean nothing from the utterances of the Supreme Court which alters the basic rules that a finding of coercion is the threshold requirement of a determination of exercise of dominant economic power." (App. A, *infra*, p. 30.) The court thus failed to perceive that the basic evil of the sales commission plan here, as in *Atlantic*, was the use of the oil company's economic power, not the particular means—whether labeled "coercion" or not—by which it was exercised. Nothing in the *Atlantic*

opinion indicates that a sales commission plan having anticompetitive effects would be saved from illegality because the oil company could accomplish its objective and thereby earn its commissions without going beyond the "promotional" activities specified in the plan.

This economic fact of life was recognized by the Court of Appeals for the Fifth Circuit in the *Shell* case. There the court specifically set aside the Commission's finding that Shell had coerced its dealers into purchasing sponsored TBA but nonetheless found that Shell had exercised its economic power and affirmed the Commission's order. (360 F. 2d at 481-483). The promotional activities engaged in by both Texaco (see *supra*, p. 6) and Shell in performance of their sales commission agreements are very similar and have the same anti-competitive effect. It is, at bottom, inconsistent with the legal premises underlying the Fifth Circuit's decision for the court of appeals in the present case to have set aside the Commission's order for the articulated reason that "In short, we do not find that Texaco used its controlling economic power *to compel* its dealers to purchase sponsored TBA." (App. A, *infra*, p. 34.) [Emphasis added.] It is therefore not an exaggeration to say that these two courts of appeals are in conflict concerning the legal standards by which the Commission is governed in such cases.

Moreover, the Commission in the instant case properly heeded the ruling of this Court in *Atlantic* that the Commission need not engage in an extensive economic analysis, nor permit the parties to show countervailing economic benefits, if a "not insubstantial"

amount of commerce is restrained by the TBA sales commission arrangement (381 U.S. at 371). Since sales of sponsored TBA to Texaco dealers in one year exceeded total sales to Atlantic dealers during a six-year period (SJA 182), the substantiality of commerce requirement clearly was satisfied in this case.

The broad discretion the Commission has to define unfair methods of competition is particularly pertinent in this case because, in reviewing its record, the Commission had the benefit of its experience gained in its comprehensive investigation into the functioning and effects of sales commission agreements for the sale of TBA in this and the related cases. Its orders enjoining such agreements in the companion cases have been affirmed on review, and its conclusions concerning the anticompetitive potential of such agreements have been approved by this Court. It properly drew upon its experience to conclude that, on the record before it, similar restraints, sufficient to justify condemnation, were present in the Texaco-Goodrich arrangement. Yet the court below, instead of limiting itself to a search for "warrant in the record" (see *Atlantic Refining, supra*, p. 11) undertook to substitute its judgment for the Commission's in analyzing the anticompetitive effect of the arrangement.

An example is the court's analysis of the Commission's finding that Texaco exercised its economic power over its dealers to promote sponsored TBA. The court's contrary holding, to the extent that it does not rest on the legally erroneous conclusion that overt coercion is a prerequisite to a finding of exercise of

economic power, see *supra*, pp. 10, 13–14, is based upon a meticulous comparison of specific practices present in *Atlantic*, but not present, or present to a lesser degree, here. (App. A, *infra*, pp. 32–34.) But the bulk of the Commission's conclusions with respect to promotion by Texaco of Goodrich TBA are undisturbed. In particular the court did not question that the Texaco salesman continually carries the promotional message in his day-to-day contacts with dealers. Yet the Commission found this "perhaps most effective of all" (App. B, *infra*, p. 59) as an exercise of economic power because the salesman, most directly involved in promoting TBA, is also an important factor in evaluating dealers to help determine if their leases or contracts with Texaco will be renewed. Nor did the court come to grips with the Commission's observation that, as in *Atlantic*, the oil company, without any investment in inventory or facilities, and without assuming any burden of sales, distribution or service, receives large commissions for promotional activities it is bound to perform under the contract. (App. B, *infra*, pp. 55–56.) "It is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers * * * " *Atlantic Ref. Co.* v. *Federal Trade Comm'n*, *supra* at 376, and it is further difficult to believe that Goodrich would have continued to pay the substantial commissions it did in the present case unless results indicated to it that this power was being effectively exercised.

Similarly, the court's conclusion that Texaco dealers were "free" to choose nonsponsored TBA, which rests in part upon a misconception of the record,[4] is in any event irrelevant to the question whether the Commission's judgment is legally and factually supportable. The Commission found substantial evidence that Texaco dealers were made aware that the company had a strong interest in their sale of sponsored TBA and that many of them believed that Texaco would look with disfavor upon their purchase of nonsponsored TBA. Thus competing suppliers were not able to gain access to these outlets (App. B, *infra*, p. 60). The court below found this evidence outweighed by contrary testimony and insufficient to sup-

[4] The court said, "The Commission's contentions must be weighed against the Examiner's finding that Texaco dealers, unlike those of Atlantic and Shell, were free to accept or reject sponsored products." (App. A p. 32). This statement apparently refers to Findings 18 and 19 of the hearing examiner's decision of September 24, 1962, but, in fact, is not supported by any findings made by the examiner. Finding 18 refers to the Texaco policy set forth in a June 1, 1948, letter that dealers were independent businessmen and were not to be forced into handling any particular merchandise. Finding 19, however, states, "This policy was not transmitted to the Texas dealers except on occasion, and then orally, by salesmen or other personnel, and it was only after the dealer sold a sufficient amount of lubricating oil to warrant the payment of a discount or rebate that he was informed by letter that he was free to select any brand of TBA merchandise which he might elect and that the only interest Texas had was to help him market that merchandise at a profit so that his business would be more successful in every way" (JA 215).

A purported company policy affecting dealers which was not communicated to the dealers until such time as they had established a relationship with the company satisfactory to Texaco is largely irrelevant to the question whether dealers were in fact free to select TBA of their choice.

port a finding of substantial market foreclosure (App. A, *infra*, pp. 36–38). But the question for the Commission was not whether all Texaco dealers, or most Texaco dealers, felt constrained to purchase sponsored TBA. The Commission had determined, through its examination of the sales commission method of promoting TBA, that the most significant anticompetitive effect of the practice was the foreclosure to nonsponsored brands of an opportunity to sell in the substantial market represented by dealer outlets of contracting major oil companies. In *Atlantic* this Court recognized "the destructive effect upon commerce that would result from the widespread use of these contracts by major oil companies and suppliers * * *." 381 U.S. at 371. Having identified a significant tendency toward the same anticompetitive effect which had been the principal basis for condemning similar sales commission arrangements, the Commission was not obliged to await the development of the identifiable foreclosure into a "full-blown" restraint, before concluding that the Texaco-Goodrich arrangement, like its counterparts, was a violation of Section 5. See *Federal Trade Commission* v. *Brown Shoe Co.*, *supra* at 321–322; *Federal Trade Commission* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394–395.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1968.